OFFICIAL RECEIVER OF HONG KONG ACTING AS LIQUIDATOR OF CHINA UNDERWRITERS LIFE & GENERAL INSURANCE CO. LTD.

v.

KAO WEI TSENG & ORS.

HIGH COURT, SINGAPORE
WEE CHONG JIN CJ
LAI KEW CHAI J
AP RAJAH J
[CIVIL APPEAL NO. 8 OF 1988]
29 MARCH 1990

COMPANY LAW: *Appeal - Whether Court has jurisdiction under s. 285 of the Companies Act 1985 [Sing] in relation to foreign companies wound up by a foreign Court - Powers and function of liquidator under s. 377(2)(b) of the Companies Act 1985 [Sing].*

This is an appeal against the decision of the High Court which ruled that it had no jurisdiction under s. 285 of the Company's Act 1985 (the Act). Section 285 is enacted in Part X Division 2 (under the classification of "Winding-Up by Court") and empowers the Court to summon before it for examination under oath, as in this instance, persons allegedly connected with the affairs of China Underwriters Life & General (in liquidation) ("China Underwriters) which is a company incorporated in Hong Kong and registered as a foreign company in Singapore.

The Supreme Court of Hong Kong on 7 May 1984 wound up the said China Underwriters and the appellant, the Official Receiver, Hong Kong was appointed to be the liquidator.

By an originating summons, the appellant applied to the High Court in Singapore for an order to summon before it the three respondents to be examined under oath concerning the affairs and property of China Underwriters pursuant to s. 285 of the Act. This application was successfully resisted by the 1st and 2nd respondents and have this appeal.

The issues before the Court were namely:

(a) Whether s. 285 of the Act extends to foreign Companies wound up by a foreign Court.

(b) Whether s. 377(2)(b) of the Act (which confers equal powers to a foreign liquidator to that of a liquidator for Singapore) can be applied in these circumstances to enlarge the jurisdiction of the High Court to exercise its extraordinary powers under s. 285 of the Act to the said foreign liquidator.

Held:

[1] The jurisdiction of the Court in relation to the winding up of companies and unregistered companies is derived from Part X of the Act. The Court has no jurisdiction under Part X in respect of corporations not wound up thereunder. Such a jurisdiction is only found in Division 2 of Part XI, and therefore s. 285 of Part X cannot apply to foreign companies.

[2] The powers and functions of a liquidator contemplated in s. 377(2)(b) of the Act are only to enable the foreign liquidator to collect and recover the assets of the foreign company in Singapore and does not confer equal powers and functions of a liquidator appointed by the High Court pursuant to a companies winding up petition.

[Appeal dismissed.]

Cases referred to:
Re Todd Investment Pty. Ltd. [1979] ACLC 40-585
Re Tropical Reef Enterprises Pty. Ltd. (In Liquidation) [1987] 5 ACLC 95
East End Dwellings Co. Ltd. v. Finsbury Borough Council [1952] AC 109

Legislation referred to:
Companies Act [Sing], ss. 249, 285, 286, 350(2), 351, (3), 377(2)(b)
Companies Act 1962-79 [Aust], ss. 249, 353(2)
Companies (Queensland) Code 1981 [Aust], s. 541
Companies Act of 1862 [UK], s. 115
Companies Act of 1929 [UK], s. 214(1)
Companies Ordinance (Cap 174) [Sing], ss. 211, 249

For the appellant - John Lindsay QC (Tang Khin Wai with him)
For the 1st respondent - Ruth Kao
2nd respondent not appearing
For the 3rd respondent - T.T Rajah (V.K. Rajah with him)

JUDGMENT:

Wee Chong Jin CJ, Lai Kew Chai J, AP Rajah J:

This is an appeal against the decision of the High Court which ruled that it had no jurisdiction under s. 285 of the Companies Act Cap. 50 1985 Edn. ("the Act") to summon before it for examination under oath persons allegedly connected with the affairs or property of a company which was incorporated in Hong Kong, which was registered in Singapore as a foreign company, but which was not wound up by the High Court in Singapore.

The appellant, the Official Receiver of Hong Kong acting as Liquidator of China Underwriters Life and General Insurance Company Limited (In Liquidation) (hereinafter referred to as "China Underwriters"), by an originating summons filed in the High Court on 7 January 1987 applied for orders to summon before it the three respondents (and the responsible officers in the case of the third respondents) and for them to be examined on oath concerning the affairs and property of China Underwriters. The application was successfully opposed by the first and third respondents on the ground that the Court had no jurisdiction; the second respondent, not being traceable, did not play any part in these proceedings.

China Underwriters was incorporated in Hong Kong on 21 January 1924. On 15 December 1980 it was registered in Singapore as a foreign company under the Companies Act Cap. 185. The Supreme Court of Hong Kong on 7 May 1984 made a winding-up against China Underwriters. The Official Receiver, Hong Kong, was appointed to be liquidator of China Underwriters. Notice of the liquidation of the appellant was given to the Registrar of Companies of Singapore on 27 July 1984. At all material times it has not been the subject of a winding-up order of the High Court of Singapore and no liquidator for China Underwriters in Singapore has been appointed. When the matter came up before the High Court, China Underwriters had been removed from the register of foreign companies.

In 1981 the shares in China Underwriters were acquired by Carrian Investments Limited ("CIL") which was incorporated in Hong Kong and which was also in liquidation when this matter came up before the High Court. CIL was part of the Carrian group, which was controlled by one George Tan, and which (according to the affidavit of Mr. J.T. Allen, a deputy principal solicitor of the Official Receiver's office of Hong Kong) "collapsed in circumstances of public scandal in 1982 and whose affairs have since attracted considerable notoriety in Hong Kong, Malaysia and elsewhere." New directors from within the Carrian group were appointed to the board of directors of China Underwriters after it became a subsidiary of CIL and they

included, among others, the second respondent and Kenneth Kao. The second respondent was the brother of George Tan and was a director of many companies within the Carrian group. Kenneth Kao was the son of the first respondent who was a deputy general manager of the third respondents until 31 May 1982 when he retired from the bank. The first respondent was also the father-in-law of George Tan who was at all material times the controller of the Carrian Group.

The investigations of the appellant revealed that in August 1980 China Underwriters acquired ownership of the 12th floor of International Plaza, Singapore, which in January 1982 was free from all encumbrances and was valued at $15.6 million. It was also found that in July 1982 China Underwriters obtained two loans from the third respondents, a bank in Singapore, which totalled $25 million. As security China Underwriters mortgaged its 12th floor, International Plaza for $9 million and pledged its time deposit of $16 million. It was further found that the proceeds of the loans from the third respondents were not used for the benefit of China Underwriters but were used for the benefit of other companies within the Carrian group and that such proceeds and the securities furnished by China Underwriters had become forever lost to China Underwriters.

Not unexpectedly, the appellant sought information from the third respondents as to the identities of the persons who negotiated the loans for both sides and the knowledge of the responsible officers of the third respondents as to the purposes for which China Underwriters had taken the loans. In his affidavit Mr. Chan Chwee Chiew, a deputy general manager of the third respondents, affirmed that the first respondent was appointed a deputy general manager of the third respondents in May 1980 and remained in that capacity until 31 May 1982 when he retired. Apart from introducing China Underwriters as a new customer of the third respondents it was asserted that the first respondent "was not a party to the bank's decision to grant the banking facilities of $25 million nor was he in a position to negotiate and/or approve the said loans on the bank's behalf." It was also disclosed by the third respondents that the deputy general manager who had negotiated the loans had returned to The Peoples' Republic of China and that he was directly accountable to the then general manager of the third respondents, Mr. Hsueh Wen Lin who was also a citizen of China and whose term of office in Singapore ended in April 1983. The third respondents had produced documentary evidence that the two loans were drawn down by China Underwriters on 15 June 1982 as to $16 million and on 18 June 1982 as to $9 million through its current account and that on 29 July 1982 the overdraft in the relevant account had been reduced to zero. The appellant did not produce any further evidence as to what happened after 29 July 1982 which would explain the loss of the $25 million and the securities.

In support of the appellant's application Mr. J.T. Allen in his affidavit mentioned that "it (was) possible that the disposition of (China Underwriters') assets as security for loans, not for use by (China Underwriters) but for use by other Carrian group companies (might) have been a breach of duties of the ... directors who were concerned" and that "constructive trusteeship obligations (might) arise on the part of other persons or institutions connected with those transactions in so far as they (might) have been aware of apparent breach of duties by the ... directors." He further mentioned that the appellant was advised by leading Counsel that the duty of the appellant, as Liquidator of China Underwriters, was to enquire fully into these matters and, in order to ascertain the factual position, to examine persons connected with the transactions under s. 285 of the Act.

We should now set out the relevant provisions of the Act. Section 285 reads:

285(1) The Court may summon before it any officer of the company or person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the Court considers capable of giving information concerning the promotion, formation, trade dealings, affairs or property of the company.

(2) The Court may examine him on oath concerning the matters mentioned in subsection (1) either by word of mouth or on written interrogatories and may reduce his answers to writing and require him to sign them, and any writing so signed may be used in evidence in any legal proceedings against him.

(3) The Court may require him to produce any books and papers in his custody or power relating to the company, but where he claims any lien on books or papers the production shall be without prejudice to that lien, and the Court shall have jurisdiction to determine all questions relating to that lien.

(4) An examination under this section or s. 286 may, if the Court so directs and subject to the Rules, be held before any District Judge named for the purpose by the Court, and the powers of the Court under this section and s. 286 may be exercised by that Judge.

(5) If any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, not having a lawful excuse, made known to the Court at the time of its sitting and allowed by it, the Court may cause him to be apprehended and brought before the Court for examination.

It is also relevant to consider s. 286 of the Act which provides as follows:

286(1) Where the liquidator has made a report under this Part stating that, in his opinion, a fraud had been committed or that any material fact has been concealed by any person in the promotion or formation or the company or by any officer in relation to the company since its formation or that any officer of the company has failed to act honestly or diligently or has been guilty of any impropriety or recklessness in relation to the affairs of the company, the Court may, after consideration of the report, direct that the person or officer, or any other person who was previously an officer of the company, including any banker, solicitor or auditor, or who is known or suspected to have in his possession any property of the company or is supposed to be indebted to the company or any person whom the Court considers capable of giving information concerning the promotion, formation, trade dealings, affairs or property of the company, shall attend before the Court on a day appointed and be publicly examined as to the promotion or formation or the conduct of the business of the company, or in the case of an officer or former officer as to his conduct and dealings as an officer thereof.

(2) The liquidator and any creditor or contributory may take part in the examination either personally or by a solicitor.

(3) The Court may put or allow to be put such questions to the person examined as the Court thinks fit.

(4) The person examined shall be examined on oath and shall answer all such questions as the Court puts or allows to be put to him.

(5) A person ordered to be examined under this section shall before his examination be furnished with a copy of the liquidator's report.

(6) Where a person directed to attend before the Court under subsection (1) applies to the Court to be exculpated from any charges made or suggested against him, the liquidator shall appear on the hearing of the application and call the attention of the Court to any matters which appear to him to be relevant and if the Court, after hearing any evidence given or witnesses called by the liquidator, grants the application the Court may allow the applicant such costs as the Court in its discretion thinks fit.

(7) Notes of the examination:

(a) shall be reduced in writing;

(b) shall be read over to or by and signed by the person examined;

(c) may thereafter be used in evidence in any legal proceedings against him; and

(d) shall be open to the inspection of any creditor or contributory at all reasonable times.

(8) The Court may if it thinks fit adjourn the examination from time to time.

Sections 285 and 286 are enacted in Part X of the Act which Part X is divided into five divisions. They come under Division 2, Part X, which is under the classification rubric "Winding Up by Court." Division 2 of Part X is itself subdivided into four subdivisions. Sections 285 and 286 appear under subdivision (4) known as "General Powers of Court". A reading of both ss. 285 and 286 indicate that they both refer to "the company" which is defined in subsection 4(1) of the Act as "a company incorporated pursuant to this Act or pursuant to any corresponding written law". Pausing here for a moment, these sections therefore on the face of them have no application to a foreign company.

However, it should be noted that Division 5 of Part X of the Act (which contains ss. 350 to 354) deals with the power of the High Court in relation to the "winding up of unregistered companies". An unregistered company for the purposes of Division 5, Part X, is defined by subsection 350(1) to include a foreign company. So far as the powers of the High Court in relation to the winding up of unregistered companies are concerned it is most important for the purposes of this appeal to bear in mind that express provisions have to be enacted to confer such powers on the High Court and to set out the circumstances under which such powers may be exercised over foreign companies which have a commercial nexus with this jurisdiction. In this connection, the express provisions are to be found in subsection 350(2) which read as follows:

> 350(2) This Division shall be in addition to, and not in derogation of, any provisions contained in this or any other written law with respect to the winding up of companies by the Court and the Court or the liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies.

Other relevant provisions in Division 5 of Part X of the Act which should be mentioned are to be found in the following subsections of s. 351:

> 351(1) Subject to this division, any unregistered company may be wound up under this Part, which Part shall apply to an unregistered company with the following adaptations:
>
> (a) the principal place of business of such company in Singapore shall for all the purposes of the winding up be the registered office of the company;
>
> (b) no such company shall be wound up voluntarily;
>
> (c) the circumstances in which the company may be wound up are:
>
> (i) if the company is dissolved or has ceased to have a place of business in Singapore or has a place of business in Singapore only for the purpose of winding up its affairs or has ceased to carry on business in Singapore;
>
> (ii) if the company is unable to pay its debts;
>
> (iii) if the Court is of opinion that it is just and equitable that the company should be wound up.

(2) ...

(3) A company incorporated outside Singapore may be wound up as an unregistered company under this Division notwithstanding that it is being wound up or has been dissolved or has otherwise ceased to exist as a company under the laws of the place under which it was incorporated.

(4) ...

We should now refer to the provisions in the Act relating to the cesser of business in Singapore of a foreign company or where a foreign company goes into liquidation or is dissolved in its place of incorporation. The provisions of subsection 377(2)(b) are highlighted as they are strongly relied upon by the appellant in the construction of s. 285 of the Act. Section 377 which appears in Division 2 of Part XI of the Act, so far as relevant, provides as follows:

377(1) If a foreign company ceases ... to carry on business in Singapore, it shall, within 7 days after so ceasing, lodge with the Registrar notice of that fact, ..., and the Registrar shall upon the expiration of 12 months after the lodging of the notice remove the name of that foreign company from the register.

(2) If a foreign company goes into liquidation or is dissolved in its place of incorporation or origin:

(a) each person who...an agent shall, within one month after the commencement of the liquidation or the dissolution ... lodge ... with the Registrar notice of that fact and, when a liquidator is appointed, notice of such appointment; and

(b) **the liquidator shall, until a liquidator for Singapore is duly appointed by the Court, have the powers and functions of a liquidator for Singapore.**

The other subsections of s. 377 of the Act require a liquidator of a foreign company appointed for Singapore by the High Court or a person exercising the powers and functions of such a liquidator, *inter alia*, (a) to invite by suitable advertisement all creditors to make their claims against the foreign company; (b) not to pay any creditor to the exclusion of any other creditors of the foreign company without an order of Court; and (c) only to recover and realise the assets of the foreign company in Singapore (unless otherwise ordered by the High Court) and subject to certain conditions to pay the net amount so recovered and realised to the liquidator of that foreign company for the place where it was incorporated only after having paid all debts and satisfied all liabilities incurred in Singapore by the foreign company.

Chan JC (as he then was), against whose judgment this appeal is brought, dealt with two Australian cases, namely *re Todd Investment Pty. Ltd*. [1979] ACLC 40-585 and *re Tropical Reef Enterprises Pty. Ltd. (In Liquidation)* [1987] 5 ACLC 95. In relation to *re Todd's* case he rightly observed that in so far as the decision was based on the combined effect of ss. 249 and 353(2) of the Companies Act 1962-79 of the State of South Australia, which are in *pari materia* with ss. 285 and 377(2)(b) of the Act, no reason was given why they had such effect. In respect of *re Tropical Reef Enterprise Pty. Ltd.*, he also rightly observed that the decision had no relevance to the issue in this case as s. 541 of the Companies (Queensland) Code 1981 was radically different from s. 285 of the Act because of (a) the expression "corporation" which made it applicable to a foreign company and (b) the language in the relevant Australian legislation which gave effect to a New South Wales winding up order as if it were a Queensland winding up order. We did not understand Counsel for the appellant, Mr. Lindsay QC, as placing much reliance on the persuasive authority of the two cases.

We would now advert to the submissions of Counsel for the appellant. Section 285 of the Act in terms only operate in respect of the affairs and property of "the company" which, by definition in the Act, is a company incorporated in Singapore. It therefore does not in terms apply to the affairs and property of a foreign company. Not being able to call in aid any express provision in s. 285, Mr. Lindsay QC took us through a process of reasoning, which he described as "a 2-stage deeming process" by which the High Court could be said to be conferred jurisdiction to make an order for examination under oath under s. 285 of the Act in connection with a foreign company on the application of a foreign liquidator. He elaborated his arguments along the following lines. By virtue of s. 377(2)(b) of the Act, the Hong Kong liquidator of China Underwriters "shall have ... the powers and functions of a liquidator for Singapore." He underlined the article in the sentence. Many of such "powers and functions", he noted, depended upon the orders of the Court. He went on to submit that, as a consequence, both the Hong Kong Liquidator and the High Court would respectively be put by statute into the position as if the Hong Kong liquidator had been a "liquidator for Singapore" appointed under s. 351 of the Act. Mr. Lindsay QC observed that the Hong Kong liquidation of China Underwriters did not preclude a Singapore winding up under s. 351(3) of the Act. He then took us to the second stage of the "deeming" process, at which there would be the inquiry as to what are the powers of a liquidator appointed in Singapore of a foreign company and what are the powers of the High Court in relation to such a liquidator. Here, he relied on s. 350(2) which we have set out earlier and which he submitted would answer both the questions. Accordingly, he ended the process of reasoning by saying that the powers of a Singapore liquidator of a Singapore company included, *inter alia*, the power to apply for an examination under s. 285 and the jurisdiction of the Court includes the ability to order the same.

Mr. Lindsay QC recognised that s. 285 sets out the power of the High Court and makes no reference to the power of any liquidator. He then went on to submit that if, as in this case, the legislature has by s. 377(2)(b) of the Act conferred on the foreign liquidator the power to apply under s. 285 of the Act, a jurisdiction in the High Court to respond to applications by foreign liquidators "is required as an inevitable consequence" within the rule of construction as enunciated in *East End Dwellings Co. Ltd. v. Finsbury Borough Council* [1952] AC 109 where Lord Tucker at pp. 132-133 as follows:

> If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it ... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

We do not accept these submissions. In our view, the powers and functions of a liquidator contemplated by the legislature under s. 377(2)(b) of the Act are to enable the foreign liquidator to collect and recover the assets of the foreign company in Singapore. It does not confer on the foreign liquidator all the powers and functions of a liquidator appointed by the High Court pursuant to a companies windingup petition. In our view it is not permissible to presume that Parliament by the insertion of s. 377(2)(b) has by an oblique, if not tortuous, process of reasoning and by a side-wind, as it were, also enlarged the jurisdiction of the High Court to exercise its extraordinary powers under s. 285 of the Act to extend, extra-territorially, to investigate into the affairs and property of foreign companies which are not wound up and therefore not controlled by the High Court. In our view, there is nothing in s. 377(2)(b) of the Act which must inevitably drive us to the conclusion that the High Court

must be given the jurisdiction under s. 285 of the Act to summon and examine on oath persons allegedly connected with the affairs, property and other facets in the life of foreign companies which are not wound up by the High Court under Division 5 of Part X of the Act.

As stated by Chan JC (as he then was) in his judgment, the jurisdiction of the Court in relation to the winding up of companies and unregistered companies is derived from Part X of the Act. The Court has no jurisdiction under Part X in respect of corporations not wound up thereunder. It has jurisdiction over foreign companies which are wound up in their respective places of incorporation or elsewhere under Division 2 of Part XI of the Act to the extent that it is provided for therein. That this is the position is reinforced by s. 350(2) which gives the Court jurisdiction to exercise any powers in the case of unregistered companies wound up under Part X which might be exercised by it in winding up companies. We agree.

In holding that the High Court has no jurisdiction to exercise its powers under s. 285 of the Act in respect of the affairs of the winding up of a foreign company not ordered by the High Court, Chan JC (as he then was) also alluded to a curious feature in relation to the operation of s. 286 of the Act if the submission of the appellant is upheld and to the statutory antecedents of s. 285. He rightly pointed out that in terms s. 286 of the Act could only be invoked by the foreign liquidator if he could and had, *inter alia*, lodged a report under s. 271 of the Act, and if he had formed the view that a fraud has been committed by officers of the foreign company in Singapore. But it is plain that provisions of Part X which impose statutory duties on the liquidator do not apply to a foreign liquidator. It would be very odd if this situation should arise.

So far as the statutory antecedents of s. 285 are concerned, its origin is s. 115 of the English Act of 1862 which enabled the English Court to summon persons before it for examination "after it has made an order for winding up the company." These words and the additional words found in s. 214(1) of the English Act of 1929 were found in s. 211 of the Singapore Companies Ordinance (Cap.174, 1955 Edn.) but were omitted by the corresponding Australian legislation. When Parliament in Singapore enacted The Companies Act 1976 based on the Australian legislation, the Singapore Companies Ordinance Cap.174, 1955 Edn. was repealed and s. 249 (now s. 285) was enacted in its present terms. The said words were omitted. Chan JC (as he then was) opined that there was no reason to believe that the omission of the words mentioned above was made in the Australian legislation "for the purpose of bringing within its ambit foreign companies which had not been would up by the Court." He thought and we agree with him that the more probable reason was that the said words regarded as superfluous and he finally and usefully drew attention to the fact that the Australian legislature has adopted the drafting formula of substituting the word "corporation" for "company" in the relevant provision.

We accordingly dismiss the appeal with costs.

Also found at [1990] 1 CLJ 1283